Tan Sri Dato' Seri Vincent Tan Chee Yioun v Star Papyrus Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S5)–23–13 OF 1999
KAMALANATHAN RATNAM J
9 SEPTEMBER 2000

Civil Procedure *— Discontinuance — Leave to file fresh action — Whether court would allow defendant to discontinue third party proceedings with leave to file afresh — Rules of the High Court 1980, O 21 r 2 & Form 36*

The defendant caused to be published words concerning the plaintiff in the way of his business and in relation to his conduct therein which the plaintiff contends is defamatory of him. The plaintiff thus sued the defendant for damages for libel and sought an injunction against further publication with costs. The defendant, in its defence, pleaded that the entire contents of the journal were prepared in Hong Kong and transmitted to the defendant. In the event of liability, the defendant would seek indemnity from Dow Jones, which owned the transmitting and receiving equipment. The defendant then took out a summons for leave to issue and serve a third party notice out of jurisdiction and named Dow Jones as the said third party. When the said summons came up for hearing the defendant was unable to obtain an order in terms and its papers were not in order. Later, the defendant obtained leave to issue the third party notice with consequential orders. The court then by way of a letter addressed to the Ministry of Foreign Affairs enclosed the relevant documents for service upon the said third party in Hong Kong. In April 2000, the defendant applied to extend the life of the third party notice by a year and obtained an order in terms. The defendant later filed a notice of discontinuance of the third party proceedings but with liberty to file afresh. When the case came up for case management, the court was informed that the defendant was withdrawing the said third party proceedings. The court made an order that the claim against the third party was to be struck out with no liberty. The defendant appealed.

Held, dismissing the appeal:

(1) Form 36 of the Rules of High Court 1980 does not provide for a conditional withdrawal by the defendant as was done by the defendant in this case. The defendant has read into Form 36 a self-imposed protective condition for his withdrawal of the third party proceedings (see p 559E).

(2) The defendant informed the court that she was merely withdrawing the third party proceedings and gave no reason for doing so. To the mind of the court, the defendant's conduct in applying for leave to serve the third party notice out of

jurisdiction, obtaining the order, and subsequently withdrawing with liberty and without giving any reason shows the insincerity of the defendant. Having pleaded that it has no control over the publication and thus claiming indemnity against the third party, its subsequent withdrawal and the subtle request for liberty to refile could in the view of the court lead to an abuse of the process because once leave to file afresh is given there is nothing to prevent the defendant from applying, once the case is fixed for trial, for fresh leave to issue out third party proceedings and thus delaying the proceedings. If the defendant was serious with its cause as against the third party it ought to have proceeded to effect service. In any case even after the court had made its decision to strike off the third party proceedings with no liberty, counsel never saw it fit to address the court on this issue. No leave ought to be given as, in so far as the defendant is concerned, it had decided not to pursue with the third party proceedings (see p 559F–I).

[Bahasa Malaysia summary

Defendan menyebabkan penerbitan kata-kata mengenai plaintif berkaitan dengan perniagaannya serta tingkah lakunya sebagai peniaga yang dirasakan oleh plaintif bersifat fitnah. Plaintif dengan itu mendakwa defendan bagi gantirugi untuk libel dan ingin mendapatkan satu injunksi menentang penerusan penerbitan dengan kos. Defendan, di dalam pembelaannya, berhujah bahawa segala isi kandungan jurnalnya disediakan di Hong Kong dan dipancar kepada defendan. Jika timbulnya liabiliti, defendan akan mendapatkan tanggung rugi dari Dow Jones, yang memiliki peralatan pemancaran dan penerimaan. Defendan kemudiannya mendapatkan satu saman untuk kebenaran mengeluarkan dan menyampaikan notis pihak ketiga di luar bidangkuasa dan menamakan Dow Jones sebagai pihak ketiga tersebut. Apabila saman tersebut sedia dibicarakan, defendan tidak mampu memperolehi perintah seperti dikehendaki dan dokumen-dokumennya belum teratur. Selepas itu, defendan mendapat kebenaran untuk mengeluarkan notis pihak ketiga dengan perintah berikutnya. Selepas itu, mahkamah melalui surat yang dialamatkan kepada Kementrian Luar Negeri melampirkan dokumen-dokumen yang relevan untuk disampaikan kepada pihak ketiga di Hong Kong. Pada April 2000, defendan memohon melanjutkan hayat notis pihak ketiga selama setahun dan mendapat perintah seperti dikehendaki. Defendan kemudiannya memfailkan satu notis pemberhentian prosiding pihak ketiga tetapi dengan kebebasan memfail semula. Apabila kes tersebut dikemukakan untuk pengurusan kes, mahkamah diberitahu bahawa defendan ingin menarik balik prosiding pihak ketiga. Mahkamah memberikan perintah bahawa tuntutan terhadap pihak ketiga akan dibatalkan tanpa apa-apa kebebasan. Defendan tersebut merayu.

Diputuskan, menolak rayuan tersebut:

(1) Borang 36 Kaedah-kaedah Mahkamah Tinggi 1980 tidak mempunyai peruntukan bagi penarikan balik bersyarat oleh defendan seperti yang dilakukan oleh defendan dalam kes ini. Defendan telah mentafsir dalam Borang 36 satu syarat berperlindungan yang dikenakannya sendiri untuk penarikan balik prosiding pihak ketiganya (lihat ms 559E).

(2) Defendan memberitahu mahkamah bahawa beliau cuma menarik balik prosiding pihak ketiga dan tidak memberikan sebab mengapa beliau berbuat demikian. Pada fikiran mahkamah, tingkah laku defendan dengan memohon kebenaran menyampaikan notis pihak ketiga di luar bidangkuasa, mendapatkan perintah tersebut dan selepas itu menarik balik dengan kebebasan tanpa memberikan apa-apa sebab menunjukkan sikap tidak ikhlas defendan. Setelah mengaku bahawa beliau tidak mempunyai kawalan ke atas penerbitan tersebut dan menuntut tanggung rugi dari pihak ketiga, penarikan baliknya dan permintaan tersiratnya untuk kebebasan memfail semula dapat, dalam pandangan mahkamah, menjadi satu penyalahgunaan proses kerana sebaik sahaja kebenaran untuk memfail semula diberikan tiada apa-apa yang dapat menghalang defendan dari memohon, setelah kes tersebut ditetapkan untuk perbicaraan, kebenaran baru untuk mengeluarkan prosiding pihak ketiga dan dengan itu melengahkan prosiding tersebut. Jika defendan beriya-iya dengan kausanya terhadap pihak ketiga beliau sepatutnya memulakan penyampaian. Dalam apa jua keadaan, walaupun selepas mahkamah telah membuat keputusannya untuk membatalkan prosiding pihak ketiga tanpa kebebasan, peguam merasakannya tidak sesuai untuk menghadapi mahkamah mengenai perkara ini. Tiada kebenaran harus diberikan kerana, di mana ia berkaitan dengan defendan, beliau telah membuat keputusan untuk tidak meneruskan prosiding pihak ketiga (lihat ms 559F–I).]

Notes

For cases on discontinuance of action, see 2(1) Mallal's Digest (4th Ed, 1998 Reissue) paras 1560–1568.

Legislation referred to

Rules of the High Court 1980 O 21 r 2, Form 36

VK Lingam (*VK Lingam & Co*) for the plaintiff.

(*Bhag Singh*) (*Gurmeet Kaur* and *Amizaizul Izral b Amran* with him) (*Bhag Sulaiman & Co)* for the defendant.

Kamalanathan Ratnam J. : The plaintiff is a well known Malaysian businessman. The defendant was at all material times the printer of the

Asian Wall Street Journal newspaper ('the Journal') with a large circulation in Malaysia and throughout Asia. On 21 December 1998, the defendant caused to be printed and published words concerning the plaintiff in the way of his business and in relation to his conduct therein which the plaintiff contended was defamatory of him. He thus sued the defendant for damages for libel and sought an injunction against further publication with costs.

In its defence to the action, the defendant pleaded in the alternative that the entire contents of the Journal (including that of the issue of 21 December 1998) were prepared and editorially laid out in Hong Kong and transmitted by electronic signals to the Dow Jones equipment in the defendant's premises since the defendant had provided a secure room for the installing of equipment owned by Dow Jones Publishing Company (Asia) Inc ('Dow Jones'), to receive in negative print form the contents of the Journal transmitted by Dow Jones from Hong Kong. The defendant also expressly pleaded that in the event the defendant was held liable to the plaintiff, the defendant would seek indemnity from Dow Jones for any liability so found.

The defendant then took out, based on a certificate of urgency, a summons for leave to issue and serve a third party notice out of jurisdiction and named Dow Jones as the said third party. On 7 April 1999, when the said summons came up for hearing, the defendant was unable to obtain an order in terms and its papers were not in order. However, on 13 April 1999, the defendant obtained the said leave to issue the third party notice against the said Dow Jones with consequential orders. The defendant then issued out the third party notice on 24 April 1999. The court then by way of a letter dated 10 May 1999, and addressed to the Ministry of Foreign Affairs enclosed the relevant documents for service upon the said third party in Hong Kong. On 14 January 2000 the defendant's solicitors wrote to the court for an adjournment of the case management on the basis that they were informed by the Ministry of Foreign Affairs that the third party notice had not as yet been served in Hong Kong. On 10 April 2000, with a certificate of urgency the defendant applied by way of a summons to extend the life of the third party notice by one year and obtained an order in terms. On 13 June 2000 the defendant filed a notice of discontinuance of the third party proceedings. However, in the notice the defendant had stated that the notice of discontinuance was with liberty to file afresh. The exact words of the 'Notis Pemberhentian' reads as follows in Bahasa Malaysia:

> NOTIS PEMBERHENTIAN
>
> Ambil perhatian bahawa defendan sama sekali memberhentikan tindakan ini terhadap Pihak Ketiga *dengan kebebasan untuk memfailkan semula*. (Emphasis added.)
>
> Bertarikh pada 13 Jun 2000

On 13 July 2000, when this case came up for case management, Ms Gurmeet Kaur, appearing for the defendant, informed the court that she was withdrawing the said third party proceedings. I then made an order that

the claim against the third party was to be struck out with no liberty. The defendant has appealed against my order refusing to grant liberty to file afresh.

Findings of the court

Firstly, I will consider the notice of discontinuance filed on 13 June 2000.

A party can discontinue an action against another pursuant to O 21 r 2 of the Rules of the High Court 1980 and the form for discontinuance provided by the rules as Form 36, is as follows:

No 36

NOTICE OF DISCONTINUANCE (O 21 r 2)

(Title as in action)

Take notice that the plaintiff wholly (or specify the part) discontinues this action (or the defendant wholly (or specify the part) withdraws the defence or discontinues his counterclaim) against the defendant (plaintiff).

Dated the … day of … 19 …

… … … …
Solicitor for the … … …

To the Registrar and the other parties to the action.

It is clear that the said format does not provide for a conditional withdrawal by the defendant as was done by the defendant in this case. The defendant has read into the form a self-imposed protective condition for his withdrawal of the third party proceedings.

Besides, the defendant when represented by counsel on 13 July 2000 informed the court that she was merely withdrawing the third party proceedings and gave no reason for doing so. To my mind the defendant's conduct in applying for leave to serve the third party notice out of jurisdiction, obtaining the order, and subsequently withdrawing with liberty and without giving any reason shows the insincerity of the defendant. Having pleaded that it has no control over the publication and thus claiming indemnity against the third party, its subsequent withdrawal and the subtle request for liberty to refile could in my view lead to an abuse of the process because once leave to file afresh is given there is nothing to prevent the defendant from applying, once the case is fixed for trial, for fresh leave to issue out third party proceedings and thus delaying the proceedings. If the defendant was serious with its cause as against the third party it ought to have proceeded to effect service. In any case even after the court had made its decision to strike off the third party proceedings with no liberty, counsel never saw it fit to address the court on this issue. Since I had just then made the order, I could have been persuaded with valid and sound reasons of course, to change my mind. This was not done. However, on 10 August 2000 an appeal has been filed. It is my judgment that no leave ought to be given as, in so far as the defendant is concerned, it had decided not to pursue with the third party proceedings. The defendant must remember

that whilst justice might be said to travel with a leaden heel, it strikes with an iron hand.

Appeal dismissed.

Reported by Wong Ee Lynn